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No. 81-2290

In the

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

CINCINNATI ASSOCIATION FOR THE BLIND,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

### SUPPLEMENTAL STATEMENT OF THE CASE

The Petitioner in this controversy, the Cincinnati Association for the Blind (hereinafter referred to as the "Association") adopts the Statement of the Case set forth in its Petition for Writ of Certiorari in this case, which was filed on June 11, 1982.

In its Petition the Association set forth several reasons in support of the granting of the Writ of Certiorari. See Petition, pages 11-23. One of these reasons was the conflict

between the United States Courts of Appeals for the Fifth and Sixth Circuits. In the Sixth Circuit, a National Labor Relations Board's order requiring the Association to bargain with Local 100 of the Teamster Union concerning a bargaining unit including blind and disabled sheltered workshop clients was enforced. *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982). A similar NLRB order had previously been denied enforcement by the Fifth Circuit in *NLRB* v. *Lighthouse for the Blind*, 653 F.2d 206 (5th Cir. 1981). This conflict was recognized by the Sixth Circuit. *Cincinnati Association for the Blind* v. *NLRB*, *supra* at 574.

This decision by the Fifth Circuit was extant at the time the Petition in the instant case was filed. However, on June 17, 1982, the Fifth Circuit granted rehearing in the *Houston* case and withdrew and vacated its 1981 judgment. *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), rehearing granted, 679 F.2d 379 (5th Cir. June 17, 1982). Thus, rehearing was granted after the Petition for Writ of Certiorari was filed in the instant case.

Oral argument before the Fifth Circuit in *Houston*, *supra*, is scheduled for October 6, 1982. Counsel for the Petitioner is informed by the Clerk of the Fifth Circuit that the average time between oral argument and decision is approximately ninety days.

## ARGUMENT

The purpose of this Reply Brief is to set forth the position of the Petitioner, the Cincinnati Association for the Blind, with respect to the recent decision of the United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), *rehearing granted*, 679 F.2d 379 (5th Cir. 1982). Because the Fifth Circuit's decision granting rehearing was issued

after the filing of the Petition in this case, it was raised for the first time in the Brief in Opposition.

1. In *Houston, supra*, the Fifth Circuit originally refused to enforce a National Labor Relations Board order asserting jurisdiction over the blind and disabled clients in the sheltered workshop of the Lighthouse for the Blind of Houston, because that order was "not supported by substantial evidence." *Id.*, 653 F.2d at 210.

After the filing of the Petition for Certiorari by the Association in the instant case, the Fifth Circuit vacated its refusal to enforce the NLRB's order and granted a rehearing on the matter. Thus, the Fifth Circuit has not agreed with the decision of the Sixth Circuit in *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982).

Rather, the Fifth Circuit has decided to reconsider its decision in that matter. The Fifth Circuit will either reassert its order refusing to enforce the Board's order or change its position and enforce the NLRB Order. The former will reinstitute the conflict between the Fifth and Sixth Circuits; the latter will end the conflict.

As discussed in detail in the Association's Petition for Certiorari in this case, the imposition of jurisdiction by the NLRB over the blind and disabled clients in the Association's sheltered workshop would diminish the Association's ability to provide its important rehabilitation and therapeutic services to these individuals. See especially, pp. 17-23 of the Petition. The NLRB articulated and applied this view in *Goodwill Industries of Southern California*, 231 NLRB 536 (1977).

This issue has generated substantial ligiation. Conflicting decisions have been issued by the NLRB. The Fifth Circuit's decision to reconsider its decision in *Houston, supra*, adds an additional dimension to this conflict. It emphasizes the complex and difficult nature of the issue and the need for definitive resolution by this Court.

For these reasons, the Cincinnati Association for the Blind urges this Court to accept and decide this controversy.

Alternatively, the Association urges this Court to hold this matter in abeyance until the Fifth Circuit again issues a decision in the *Houston* controversy. Oral argument is scheduled for October 6, 1982. Thus, a decision is likely to be reached by the Fifth Circuit relatively soon.

Under these circumstances awaiting the Fifth Circuit's decision in *Houston*, *supra* before ruling on this Petition for Certiorari will foster an early resolution to the fundamental issue by this Court.

In addition, unnecessary injury to the Association's sheltered workshop may be avoided by awaiting the Fifth Circuit's decision. If the Sixth Circuit's decision here were to remain in effect because of the denial of the Writ of Certiorari, and this Court later refuses to enforce a similar Board order in another controversy involving the same issue, the ability of the Cincinnati Association's workshop to provide its services to its blind and disabled clients will have been needlessly diminished. This is especially true if the Fifth Circuit's decision on rehearing, re-establishing a conflict between circuits, would be the basis on which Certiorari is granted in that other controversy.

Under these circumstances, if Certiorari is not now granted in this case, a decision on whether to grant the Writ of Certiorari should be delayed until the Fifth Circuit has again issued its decision in the *Houston* case.

2. On page 7 of the Brief in Opposition, the following sentence appears:

> "Petitioner is mistaken in its claim (Pet. 12-13) of a conflict among the circuits."

From this sentence it might be erroneously inferred that the Petition for Certiorari filed by the Cincinnati Association for the Blind either intentionally misstated the state of the law or failed to properly cite *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), *rehearing granted*, 679 F.2d 379 (5th Cir. June 17, 1982).

In fact, a clear, recognized conflict between the Fifth and Sixth Circuits existed at the time of the filing of the Association's Petition for Certiorari on June 11, 1982. Compare *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982), with *NLRB* v. *Lighthouse for the Blind of Houston, supra*. This conflict between the circuits was altered only by the subsequent decision of the Fifth Circuit, a fact which was not mentioned at all in the Brief in Opposition.

For these reasons, any inference that no conflict between the Fifth and Sixth Circuits existed at the time of the filing of the Association's Petition for Certiorari would be unfounded and must be disregarded.

Respectfully submitted,

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